Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NAJWA BAKAL,
Petitioner,
V.

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, AND
IMMIGRATION AND NATURALIZATION SERVICE (INS),

Respondents.

On Petition For Writ Of Certiorari
To The Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

Petitioner is Najwa Bakal, a native of Baghdad, Iraq and the mother of two minor United States citizens who had removal proceedings commenced against her when she sought an adjustment of status in conjunction with being married. The Immigration and Naturalization Service (INS) commenced removal proceedings under 8 U.S.C. § 1229a against the alien petitioner. After appearing at two of the scheduled hearings, the Immigration Judge ordered *in absentia* that Petitioner be deported to Iraq when she failed to appear at the final hearing. Claiming it lacked jurisdiction over the matter, the Board of Immigration Appeals (BIA) refused to hear her timely appeal. Relying on 8 C.F.R. § 214.15, the court of appeals affirmed this refusal to exercise jurisdiction. The questions presented are:

1. Do federal courts have jurisdiction to review *in absentia* removal orders under statutory language contained in 8 U.S.C. § 1229a(b)(5)(D) providing for judicial review of such orders even though a regulation states there shall be no judicial review of *in absentia* removal orders?

2. Was the petitioner deprived of her constitutional right to due process since she was never afforded an opportunity to appeal the determination by an immigration judge that she was removable?

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OF THE UNITED STATES, AND IMMIGRATION AND
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

Najwa Bakal, the petitioner in this matter, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion and order of the court of appeals (App. *infra*. 1a - 8a) is unreported. The opinion of the court of appeals denying the INS motion to dismiss and granting Petitioner's Motion to Stay the Deportation Proceedings (App. *infra*. 9a-11a) is unreported. The order of the Board of Immigration Appeals (App. *infra*. 12a-13a) is unreported. The order of the Immigration Judge (App. *infra*. 14a - 15a) is unreported. The transcript of proceedings before the

immigration judge wherein the immigration judge made oral orders and findings, has been reprinted in its entirety in the appendix (App. *infra* 16a - 42a). The order denying rehearing (App. *infra*. 43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2003. A petition for rehearing in the court of appeals was filed on February 17, 2003, which was denied on February 28, 2003 (App. *infra*., 43a). On Petitioner's motion, the time for filing a petition for a writ of certiorari was extended by Justice Stevens on May 20, 2003 until July 28, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part that "No person shall be ... deprived of life, liberty, or property, without due process of law...." U.S. CONST. AMEND. V.

In reference to *in absentia* removal orders, the Immigration and Nationality Act (INA), 8 U.S.C. § 1229a(b)(5)(C)-(D), states:

> "(C) Rescission of order
> Such an order may be rescinded only--
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien. The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review
Any petition for review under section 1252 of this title of an order entered *in absentia* under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable."

The Code of Federal Regulations, 8 C.F.R. § 214.15 provides in relevant part:

"Pursuant to 8 CFR part 3, an appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered *in absentia*."

STATEMENT

On August 24, 1994, the petitioner, who was a teenager at the time, was convicted of shoplifting. She was admitted to a youthful trainee program and sentenced to probation for a year. Her juvenile conviction was later expunged. Thereafter, she retained counsel who filed her paperwork to obtain lawful permanent resident status. Her

application indicated that she had not "been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance." On March 7, 1996, the petitioner's status was adjusted to lawful permanent resident status by the Immigration Naturalization Service (INS). Thereafter, on October 11, 1999, the INS commenced removal proceedings against her.

1. The removal proceedings commenced before an Immigration Judge (IJ) on February 16, 2000. Throughout the hearings, the petitioner challenged the alleged grounds for removability. The petitioner attended the first hearing which was continued until July 12, 2000 to provide the government with an opportunity to conduct further investigation (See Transcripts from hearing, App. *infra* 16a - 42a). The petitioner attended the second hearing. Once again, the hearing was continued. The petitioner, who mistakenly believed the hearing was at a different time, failed to attend the third and final hearing which was held on August 18, 2000. At that hearing, the IJ entered an *in absentia* removal order against the petitioner because she failed to appear at this hearing. Prior to entering the order, the IJ indicated that had the petitioner appeared, she would have given the legal memorandum prepared on her behalf "a great deal of consideration" (App. *infra* 41a).

2. On August 28, 2000, the petitioner appealed the determination by the immigration judge that she was removable to the Board of Immigration. Therein, the petitioner challenged the IJ's *in absentia* removal order by asserting both that the record failed to support a finding that she had been convicted of a crime of moral turpitude or that she had engaged in fraud or misrepresentation of a material fact. The appeal implied that the INS had failed to meet its burden of proof with respect to whether the petitioner was

removable.

3. Approximately 9 months after the IJ entered her *in absentia* removal order, the Board of Immigration Appeals (BIA) summarily denied the petitioner's appeal on May 31, 2001 (App. *infra* 12a - 13a). In its one page per curiam order, the Board asserted it lacked jurisdiction to review the appeal because the petitioner's only recourse was filing a motion to reopen the proceedings with the IJ under 8 U.S.C. § 1229a(b)(5)(C). Under this section, a motion to rescind an *in absentia* order and reopen the proceedings may be filed within 180 days from the date of the removal order when the alien is absent from the hearing due to exceptional circumstances. This time period had long since expired by the time the BIA ruled that this was the petitioner's only recourse.

4. On June 27, 2001, the petitioner appealed this decision of the BIA to the Sixth Circuit by filing a petition for review. The Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(D) expressly provides for limited judicial review of *in absentia* removal orders. The petition for review alleged that the petititioner's due process rights were violated when the BIA refused to exercise jurisdiction over her appeal because she was not afforded an opportunity to appeal the IJ's determination that she was removable.

5. The INS responded by asserting that the BIA properly concluded it lacked jurisdiction over the petitioner's appeal because the petitioner had failed to exhaust her administrative remedies by filing a motion to rescind and reopen her removal proceedings.

6. To ensure her continued presence in this country, the petitioner also filed a Motion to Stay the

Deportation Proceedings with the Sixth Circuit on June 28, 2001. The INS filed a Motion to Dismiss the petition, asserting that the petitioner had failed to exhaust her administrative remedies because she had not filed a motion to reopen the proceedings with the IJ. The Sixth Circuit disposed of both of these motions in an order issued on August 14, 2001. In its order, the Sixth Circuit determined that to "require [the petitioner] to file a motion to reopen prior to seeking review of the Board's order dismissing her appeal would be pointless." (App. *infra* 10a)(quoting *Ohio v. Roberts*, 440 U.S. 56, 74 (1980)("The law does not require the doing of a futile act.")).

7. On January 3, 2003, the Sixth Circuit affirmed the decision of the BIA. Notwithstanding the plain language of 8 U.S.C. § 1229a(b)(5)(D), it held that there is no appeal from an order of removal entered *in absentia*. The Sixth Circuit based its decision on Section 214.15 of Title 8 of the Code of Federal Regulations which provides that "[A]n appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered *in absentia*." (App. *infra*, 5a).

REASONS FOR GRANTING THE PETITION

This is an immigration case in which important issues regarding the jurisdiction of federal courts have been raised. If federal courts have absolutely no jurisdiction to review an *in absentia* removal order as the Sixth Circuit ruled, then important constitutional procedural due process issues are raised as well. This petition should be granted to resolve these important statutory and constitutional issues.

A. Congress Exercised Its Authority to Limit the Jurisdiction of Federal Courts When It Enacted 8 U.S.C. § 1229a(b)(5)(D).

Congress has the authority to limit the jurisdiction of federal courts as long as it does so within constitutional limits. *Webster v. Doe*, 486 US 592 (1988). Congress exercised this authority when it enacted § 1229a(b)(5)(D) of the Immigration and Nationality Act. This section provides in relevant part:

> "Effect on judicial review.
> Any petition for review under section 1252 of this title of an order entered *in absentia* under this paragraph shall (except in cases described in section 1252(b)(5) of this title [addressing nationality claims]) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable." 8 U.S.C. § 1229a(b)(5)(D).

By enacting this statute, Congress expressly provided for federal court jurisdiction over *in absentia* removal orders. Quite notably, Congress did not enact a statute that completely divested federal courts with jurisdiction over *in absentia* removal orders. Had Congress chosen to enact a statute completely divesting federal courts with jurisdiction over such removal orders, which by their very nature result in a serious infringement on an individual's constitutional rights, serious questions concerning the constitutionality of the statute would be raised. *See*, *Webster*, *supra*. This petition for certiorari should be granted to clarify the scope of federal court jurisdiction over *in absentia* removal orders mandated by Congress in the INA.

B. Misplaced Reliance on Statute and CFR Improperly Limits Judicial Review Of *In absentia* Removal Order.

The Board of Immigration Appeals (BIA) summarily ruled on Petitioner's appeal by determining it lacked jurisdiction to review her *in absentia* removal order. In its one paragraph order dated May 31, 2001, the Board addressed the August 18, 2000 *in absentia* order of the Immigration Judge, stating:

> "The respondent seeks to challenge the Immigration Judge's decision but has done so by filing an appeal with the Board, rather than by filing a motion to reopen with the Immigration Judge in accordance with section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C). Under these circumstances, the record will be returned to the Immigration Court without further Board action as we are precluded by the Act from considering such an appeal. *See Matter of Guzman*, Interim Decision 3392 (BIA 1999). Accordingly, the record is returned to the Immigration Court."

Section 240(b)(5)(C) of the INA, 8 U.S.C. § 1229a(b)(5)(C) allows aliens to appeal an *in absentia* order in extremely limited circumstances. The alien must demonstrate she was absent from the hearing due to extraordinarily exceptional circumstances and in almost all instances, the alien must file such a motion 180 days after the *in absentia* order has been entered. By the time the BIA ruled that this was Petitioner's only recourse, the 180-day time period had long since expired. Accordingly, this matter was appealed.

En route to ruling on Petitioner's *Motion for a Stay*

of Deportation Proceedings, the court of appeals determined that she was not required to file a motion to reopen her proceedings since this would have been futile (App. *infra*. 10a)(quoting *Ohio v. Roberts*, 440 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act.")). However, when the court of appeals ruled on her appeal, it held that she *was* required to file a motion to reopen her proceedings. The court of appeals relied on both section 240(b)(5)(C) of the INA, 8 U.S.C. § 1229a(b)(5)(C) and the Code of Federal Regulations, 8 C.F.R. § 214.15, and affirmed the decision of the BIA which essentially held that absent extraordinarily exceptional circumstances, there is no judicial review of an *in absentia* removal order.

Section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C) provides in pertinent part:

> "Such an order may be rescinded only–
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or
>
> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien." 8 U.S.C. § 1229a(b)(5)(D).

Section 214.15 of Title 8 of the Code of Federal Regulations

provides in pertinent part: "no appeal shall lie from an order of removal entered *in absentia*." This section conflicts with the statutory language set forth in section 240(b)(5)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(D) which provides in pertinent part:

> "Effect on judicial review.
> Any petition for review under section 1252 of this title of an order entered *in absentia* under this paragraph shall (except in cases described in section 1252(b)(5) of this title [addressing nationality claims]) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) **whether or not the alien is removable**." 8 U.S.C. § 1229a(b)(5)(D)(Emphasis supplied).

Even though Section 240(b)(5)(D) of the INA provides for limited judicial review, the court of appeals stated that the "obvious negative implication of" section 240(b)(5)(C) of the INA was that the "BIA will not hear appeals of removal orders rendered *in absentia*." The court of appeals indicated that this was "further clarified by the INS regulation" which provides that "no appeal shall lie from an order of removal entered *in absentia*. 8 C.F.R.§ 214.15." The court of appeals then concluded that the BIA properly denied Petitioner an opportunity to appeal the IJ's *in absentia* removal order.

Substantial issues regarding whether Petitioner was in fact removable under the INA were raised in the immigration court. Prior to rendering her removable *in absentia*, the IJ indicated that had Petitioner been present, she would have given her legal memorandum addressing her removability considerable weight (App. *infra*. 41a). Section 240(b)(5)(D) of the INA provides for limited judicial review of *in absentia*

removal orders, including judicial review of issues addressing "whether or not the alien is removable." 8 U.S.C. § 1229a(b)(5)(D). The Petitioner specified in her Notice of Appeal which was filed with the BIA that she was contesting the IJ's determination that she was removable. However, the court of appeals affirmed the BIA's determination that it lacked jurisdiction over her appeal (App. *infra* 1a - 8a). In doing so, the court of appeals limited judicial review over *in absentia* removal orders in spite of the clear statutory language set forth in section 240(b)(5)(D) of the INA.

Thus, the court of appeals, by negative implication, construed the INA and relied on a regulation to limit federal court jurisdiction. This Court has instructed that the clear language of a statute, rather than a regulation, must be followed. *See*, *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 484 (2001)(rejecting agency's interpretation of a statutory requirement since the interpretation conflicted with the "structure and manifest purpose" of the statute); *Brown v. Gardner*, 513 U.S. 115, 122 (1994)(holding that a regulation which "flies against the plain language of the statutory text exempts courts from any obligation to defer to it"). This petition for a writ of certiorari should be granted to address whether the court of appeals properly relied on section 240(b)(5)(C) of the INA and 8 C.F.R. § 214.15 to limit judicial review of *in absentia* orders even though section 240(b)(5)(D) of the INA defines the parameters of judicial review of such orders.

C. Circuits Differ in Defining Basis of Federal Court Jurisdiction Over *In absentia* Removal Orders.

In *Herbert v. Ashcroft*, 325 F.3d 68 (1st Cir., 2003), the First Circuit relied on section 240(b)(5)(D) to delineate the parameters of its judicial review of an *in absentia*

removal order. The petitioner in *Herbert*, like the petitioner in this matter, was a lawful permanent resident and the parent of a minor United States citizen. An *in absentia* removal order was entered against him when, after attending several hearings, he was approximately 30 minutes late for his final hearing. He filed a motion to reopen his proceeding with the immigration judge (IJ), which was denied. He then appealed this denial to the BIA, which summarily affirmed the decision of the IJ.

Unlike the Sixth Circuit, the First Circuit relied on the statutory language in 8 U.S.C. § 1229a(b)(5)(D) as a basis for its jurisdiction to review the *in absentia* order. The court of appeals explained: "A petition for review challenging an order entered *in absentia* is, by statute, 'confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.' 8 U.S.C. § 1229a(b)(5)(D)." Reviewing the petitioner's case under these statutory guidelines, the court of appeals ultimately reversed the decision of the BIA.

Likewise in *Celis-Castellano v. Ashcroft*, 298 F.3d 888 (9th Cir., 2002), the Ninth Circuit relied on section 240(b)(5)(D) as the statutory provision granting it authority to engage in limited judicial review of an *in absentia* removal order. Once again, the court of appeals explained that when the issue is review of an *in absentia* removal order, "the statute provides that '[a]ny petition for review...[shall] be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.' 8 U.S.C. § 1229a(b)(5)(D)." Incidentally, unlike the First Circuit, in this case the Ninth Circuit denied the petition and thereby affirmed the decision of the BIA to deny the petitioner's motion to reopen the proceedings.

In this case, although the court of appeals of the Sixth

Circuit referred to the statutory language immediately preceding section 240(b)(5)(D), it relied on a regulation for the proposition that there was no judicial review of *in absentia* removal orders. Based on these divergent decisions, presently it is unclear whether federal courts maintain jurisdiction to review *in absentia* removal orders as suggested by 8 U.S.C. § 1229a(b)(5)(D), or whether the federal courts are precluded from exercising such jurisdiction because of 8 C.F.R. § 214.15. This petition for a writ of certiorari should be granted to resolve this important issue of federal court jurisdiction over *in absentia* removal orders.

D. Interpretation of INA and CFR Violated Petitioner's Constitutional Right to Procedural Due Process.

After the 180-day period for filing a motion to rescind an *in absentia* removal order had passed, the BIA returned Petitioner's timely filed appeal and stated that her only recourse was to file a motion to rescind the *in absentia* order under section 240(b)(5)(C) of the INA. On appeal, the court of appeals affirmed the decision of the BIA and held that federal courts do not have jurisdiction to review an *in absentia* removal order (App. *infra* 1a - 8a). The court of appeals reached this conclusion even though section 240(b)(5)(D) provides that a petitioner may raise on appeal the issue of whether s/he is removable. *See*, 8 U.S.C. § 1229a(b)(5)(D).

The resulting end of this decision is that aliens like Petitioner are denied any opportunity or forum to contest a finding that they are removable. In this particular case, Ms. Najwa Bakal, the petitioner, is married and the mother of 2 minor children who are United States citizens. As a teenager, she pled guilty after shoplifting at a local department store. She was placed on probation and

sentenced to a youthful trainee program. This conviction, which eventually led to the INS seeking her removal, was expunged before removal proceedings were commenced against her. Nevertheless, she was found removable and an *in absentia* order was entered against her.

The IJ who entered the *in absentia* removal order stated that had she appeared at the third and final hearing, she would have given her legal memoranda on whether she was removable considerable weight (App. *infra* 41a). Quite possibly the IJ believed Ms. Bakal would have an appellate forum to contest the finding that she was removable. But she did not.

The BIA's refusal to exercise jurisdiction over Petitioner's appeal deprived her of her constitutional right to due process since she was not afforded a forum to contest the determination that she was removable. The court of appeals quickly disposed of Petitioner's due process argument by stating that procedural due process requires an "opportunity to be heard" and that the Petitioner had the opportunity to be present at her *in absentia* hearing but missed this opportunity (App. *infra* 1a - 8a). The court of appeals misapprehended Petitioner's due process argument to the extent it interpreted it in reference to the *in absentia* hearing.

Under the INA, an alien ordered removable *in absentia* has the express statutory right to appeal this finding. 8 U.S.C. § 1229a(b)(5)(D). Petitioner thus argued that her right to due process was violated not at the point where the IJ entered an *in absentia* removal order, but at the point where the BIA summarily refused to exercise jurisdiction over her appeal. The BIA refused to exercise jurisdiction over her appeal because she did not file a motion to rescind her *in absentia* order. However, the statute does not require a petitioner to file a motion to rescind a removal order as a prerequisite for appealing an *in absentia* removal order under section 240(b)(5)(D). The court of appeals relied not on

section 240(b)(5)(D), but on section 240(b)(5)(C) and 8 C.F.R. § 214.15 and determined that she was not entitled to a forum to raise issues regarding her removability. Both this decision, and the decision of the BIA, deprived Petitioner of her constitutional right to due process.

An alien's right to due process was established years ago. *See, Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (stating that "this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."). The court of appeals determined that federal courts do not have jurisdiction to review an *in absentia* removal order. Unlike other circuits, with this ruling the Sixth Circuit has closed its doors to aliens seeking a forum to contest their removability. The Petitioner in this case was denied her constitutional right to due process by the court of appeals' failure to adhere to the statutory language set forth in 240(b)(5)(D). This petition for a writ of certiorari should be granted to resolve these important issues regarding an alien's right to appeal an *in absentia* order under section 240(b)(5)(D) of the INA.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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